

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

J.B. through his Guardians,  
DONALD BELL AND BARBARA BELL;  
and DONALD BELL and BARBARA  
BELL, husband and wife, and  
parents of J.B.,

Plaintiffs,

v.

MEAD SCHOOL DISTRICT NO. 354,  
Defendant.

NO. CV-08-223-EFS

**ORDER GRANTING MEAD'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND DENYING MEAD'S MOTION TO  
EXCLUDE JUDITH BILLINGS**

A telephonic hearing occurred in the above-captioned matter on December 1, 2010. Douglas Spruance and Robert F. Greer II appeared on behalf of Plaintiffs Donald and Barbara Bell; guardian ad litem J. Scott Miller appeared on Plaintiff J.B.'s behalf. Defendant Mead School District No. 354 was represented by Michael McFarland. Before the Court were Mead's Motion for Summary Judgment (ECF No. [40](#)) and Motion to Exclude Judith Billings (ECF No. [46](#)). After reviewing the submitted materials and relevant authority and hearing from the parties, the Court was fully informed and granted Mead's motion for partial summary judgment and denied its motion to exclude. This Order memorializes and supplements the Court's oral rulings.

**BACKGROUND<sup>1</sup>**

J.B., who suffers from autism and/or Asperger's disease, enrolled as a sophomore at Mead High School for the 2005-2006 school year. Before beginning classes at Mead, J.B.'s parents, the Bells, met with Assistant Principal Ron Chadwick to determine an education plan for J.B. Because Mead did not have a specific program for autistic students, J.B. was placed in special education classes and assigned a case manager, Shannon Moser, who also served as his teacher.

In spring 2006, J.B. was abused by two female students, D.R.D. and M.L.U., during "access time" on "block days,"<sup>2</sup> and on lunch hours. The

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<sup>1</sup> The parties submitted a Joint Statement of Uncontroverted Facts (ECF No. 69). The Court treats these facts as established consistent with Federal Rule of Civil Procedure 56(d), and sets these forth in this "Background" section without a reference to an ECF number. Any facts supported by a citation to the record are disputed and are presented in the light most favorable to Plaintiffs. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

<sup>2</sup> On "block days" Mead operated under a modified schedule, which allowed students who needed extra help to ask questions of their teachers. While classes typically began at 8:15 a.m. with busses arriving at 8:00 a.m., on block days, classes did not begin until 9:15 a.m., with busses arriving at the normal time. This period of delay was called "access time." While teachers and staff were required to be at school during access time, students were not. Those students who came to school but did not receive help from teachers were to remain in

1 abuse occurred when J.B. was playing "truth or dare," a game in which  
2 Mead special education students M.L.U. and D.R.D. would "order" other  
3 students, including J.B., to perform dares.<sup>3</sup> The students played this  
4 game primarily in the field house, the "back room," the wrestling room,  
5 and the gym.<sup>4</sup>

6 A game that started relatively innocently evolved into a pattern of  
7 sexual and physical abuse of J.B. Before May 2006, D.R.D. and M.L.U.  
8 hugged J.B. and directed him to kiss their bare buttocks or kicked J.B.  
9 in his buttocks. They also dared him to hug the principal and touch  
10 another student's backpack. On about five occasions, J.B. was ordered  
11 to touch M.L.U. and D.R.D.'s breasts and kiss other students. In May  
12 2006, J.B. was forced to pull his pants down and expose his  
13 genitals. The girls spit into J.B.'s mouth, kicked him in the genitals,  
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15 certain designated areas of the school: the library, the mall area, or  
16 teachers' classrooms. Vice Principal Ron Chadwick, who was responsible  
17 for all discipline and safety at Mead, and para-educator Lynn Coleman  
18 separately walked the halls during access time to supervise students.  
19 Other staff members were located in the library, the mall, and in  
20 hallways, although most teachers were not available to supervise students  
21 outside the classroom.  
22

23 <sup>3</sup> The students set up a "lookout," who would tell the students to  
24 "run" or "get out of there" if someone was coming.

25 <sup>4</sup> The back room is a hallway that connects the gym with the field  
26 house. Students were prohibited from being in the gym and field house  
unless a teacher was present and supervising them.

1 struck his genitals with a skateboard, made him suck another student's  
2 genitalia, made another student suck J.B.'s genitalia, and sucked on or  
3 fondled J.B.'s genitalia.

4 Sometime in May 2006, teacher Wesley Graham entered the field house  
5 during the lunch hour to find M.L.U. sitting on top of J.B., both of whom  
6 were fully clothed. Both parties agree that J.B. was lying on the floor  
7 and that M.L.U. was on top of him. M.L.U.'s exact positioning, however,  
8 is disputed: J.B. claims that M.L.U. was laying on top of him, moving up  
9 and down, and "pretending to rape" or "hump" him (ECF No. 42, Ex. A, at  
10 79-80); Mr. Graham recalls seeing M.L.U. "sitting astride," "hold[ing]  
11 [] down," or "wrestling" with J.B., but insists that he did not witness  
12 any sexual or abusive behavior (ECF No. 44, at 2-3; ECF No. 67, Ex. H,  
13 at 9-11). Mr. Graham immediately told the students to leave because he  
14 did not believe they were making productive use of the field house.  
15 Although all staff members had the authority, responsibility, and duty  
16 to take corrective action reasonably necessary to stop inappropriate  
17 behavior, Mr. Graham did not notify Mr. Chadwick or any other staff  
18 members of this incident.

19 On June 1, 2006, D.R.D. and M.L.U. forced J.B. to follow them into  
20 the back room, where they told him to pull his pants down and chase  
21 another student, M.E.F., around the room. J.B. complied, until he  
22 "realized that it didn't seem right for [him] to do that, so [he]  
23 stopped." M.E.F. left the room and told a staff member what had  
24 happened, who relayed this information to Mr. Chadwick. An investigation  
25 was initiated: Mr. Chadwick interviewed ten students and contacted the  
26

1 Sheriff's Office. Only then did J.B. disclose that the girls were  
2 sexually and physically abusing him.

3 The only time J.B. disclosed anything about M.L.U. and D.R.D.'s  
4 conduct was when he told Ms. Moser that D.R.D. told him to hug the  
5 principal and touch another student's backpack. Not even Mrs. Bell, who  
6 was employed as a para-educator at Mead School District from 2006 through  
7 June 2008, knew of any sexual conduct. She did, however, recall that  
8 J.B. had told her in January 2006 that D.R.D. had kissed him. Mrs. Bell  
9 did not discuss the kissing with anyone at school until April 25, 2006;  
10 she believed that kissing was what kids do in high school and only  
11 revealed to her that J.B. was interacting with kids at school. The Bells  
12 told J.B. that he should notify a teacher if anything inappropriate  
13 occurred.

14 M.L.U., who functioned between the third and fifth grade level  
15 during the relevant time period, had been disciplined for outbursts,  
16 defiance, cutting class, truancy, argumentative behavior, and refusal to  
17 cooperate with her teachers. D.R.D.'s disciplinary record similarly  
18 indicates a history of truancy, use of profanity, dishonesty and  
19 cheating, lack of cooperation, restlessness and inattentiveness, leaving  
20 campus without permission, and being in unauthorized areas without  
21 supervision. In fact, on March 2, 2006, Ms. Moser sent a letter to Mr.  
22 Chadwick advising that D.R.D. was such a disciplinary problem that she  
23 was to be monitored at all times, except for access time and the lunch  
24 period, and a written report was to be made for each period of the  
25 day. (ECF No. 58, Ex. H.)

1 Although Mr. Chadwick knew of both girls' disciplinary history, he  
2 claims no knowledge of any bullying, harassment, or sexual-related  
3 misconduct before June 1, 2006. Ms. Enkema, a teacher who had D.R.D. in  
4 classes and knew M.L.U., claims she had no idea or suspicion that the  
5 girls were telling J.B. to do sexually inappropriate things. But at a  
6 March or April 2006 meeting, she had asked Ms. Moser to keep an eye on  
7 the situation between D.R.D. and J.B.

8 Mr. Chadwick suspended both girls for the remainder of the 2005-2006  
9 school year, prohibited J.B. from taking any classes with his abusers,  
10 and assigned a one-on-one supervisor to walk J.B. to class. At Mr.  
11 Chadwick's request, D.R.D. transferred to another high school. Mr.  
12 Chadwick also contacted Elizabeth A. Pechous, Ph.D., who specializes in  
13 clients with autism, to provide counseling services to J.B. Dr. Pechous  
14 observed, diagnosed, and treated J.B. for issues surrounding the  
15 incident; these include PTSD, depression, anxiety with eating, and  
16 difficulty sleeping. Academically, J.B. has been preoccupied and  
17 distracted at school. J.B. told his mother that he considered ". . .  
18 killing himself so he wouldn't have to think about it anymore." (ECF No.  
19 58, Ex. GG, p. 132.) J.B. was never physically or sexually touched at  
20 school again; he graduated in June 2008.

21 On June 9, 2008, the Bells filed this action in Spokane County  
22 Superior Court, alleging a number of negligence-based state law causes  
23 of action and two federal claims under Title IX and 42 U.S.C. § 1983.  
24 (ECF No. 1.) The case was subsequently removed to this Court. *Id.* On  
25 September 24, 2010, Mead filed the motions under consideration, which  
26 seek summary dismissal of the Bells' two federal causes of action and to

1 exclude Judith Billings, the Bells' liability expert, from testifying  
2 regarding school policies and procedures.

3 **DISCUSSION**

4 **I. Defendant's Motion for Summary Judgment (ECF No. 40)**

5 **A. Summary Judgment Standard**

6 Summary judgment is appropriate if the "pleadings, the discovery and  
7 disclosure materials on file, and any affidavits show that there is no  
8 genuine issue as to any material fact and that the moving party is  
9 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once  
10 a party has moved for summary judgment, the opposing party must point to  
11 specific facts establishing that there is a genuine issue for trial.  
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving  
13 party fails to make such a showing for any of the elements essential to  
14 its case for which it bears the burden of proof, the trial court should  
15 grant the summary judgment motion. *Id.* at 322. "When the moving party  
16 has carried its burden of [showing that it is entitled to judgment as a  
17 matter of law], its opponent must do more than show that there is some  
18 metaphysical doubt as to material facts. In the language of [Rule 56],  
19 the nonmoving party must come forward with 'specific facts showing that  
20 there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v.*  
21 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted)  
22 (emphasis in original opinion).

23 When considering a motion for summary judgment, a court should not  
24 weigh the evidence or assess credibility; instead, "the evidence of the  
25 non-movant is to be believed, and all justifiable inferences are to be  
26 drawn in his favor." *Anderson*, 477 U.S. at 255. This does not mean that

1 a court will accept as true assertions made by the non-moving party that  
2 are flatly contradicted by the record. *See Scott v. Harris*, 550 U.S. 372,  
3 380 (2007) ("When opposing parties tell two different stories, one of  
4 which is blatantly contradicted by the record, so that no reasonable jury  
5 could believe it, a court should not adopt that version of the facts for  
6 purposes of ruling on a motion for summary judgment.").

7 **B. Title IX Claim**

8 Mead contends it is not liable for any alleged Title IX violations  
9 because a school official neither had actual knowledge that J.B. was  
10 being abused nor acted with deliberate indifference. The Bells oppose  
11 the motion, submitting that a genuine issue of material fact exists for  
12 trial.

13 Title IX provides in pertinent part: "No person in the United States  
14 shall, on the basis of sex, be excluded from participation in, be denied  
15 the benefits of, or be subjected to discrimination under any education  
16 program or activity receiving Federal financial assistance . . . ." 20  
17 U.S.C. § 1681(a). The Supreme Court has held that a school district  
18 receiving federal funds may be liable for damages under Title IX when one  
19 student sexually harasses another. *See Davis v. Monroe Cnty. Bd. of*  
20 *Educ.*, 526 U.S. 629, 633 (1999). To establish such liability, a  
21 plaintiff must show: 1) he suffered sexual harassment that was so severe,  
22 pervasive, and objectively offensive that it could be said to deprive him  
23 of access to the educational opportunities or benefits provided by the  
24 school; 2) the funding recipient had actual knowledge of the sexual  
25 harassment; and 3) the funding recipient was deliberately indifferent to  
26 the harassment. *Id.* at 650; *Reese v. Jefferson Sch. Dist. No. 14J*, 208

1 F.3d 736, 739-40 (9th Cir. 2000) (applying *Davis* standard). The Court  
2 discusses each element in turn.

3 **1. J.B.'s Access to Mead's Educational Opportunities or Benefits**

4 To prevail on the first prong of the *Davis* test, J.B. must prove he  
5 suffered sexual harassment so severe, pervasive, and objectively  
6 offensive that it could be said to deprive him of access to the  
7 educational opportunities or benefits Mead provided. *Davis*, 526 U.S. at  
8 650. Mead concedes that the abuse was severe, pervasive, and objectively  
9 offensive, but argues that the Bells cannot establish the abuse deprived  
10 J.B. of access to any educational opportunities or benefits provided by  
11 the school.

12 To prove he was deprived of educational opportunities or benefits,  
13 the victim must show that the sexual harassment undermined and detracted  
14 from his educational experience in that he was denied equal access to the  
15 school's resources and educational opportunities. *Id.* The harassment  
16 need not have physically deprived the victim of such access, *id.* at 650;  
17 rather, the abuse must have had a "concrete, negative effect" on it. *Id.*  
18 at 654; *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D.  
19 Cal. 2009) (citing *Davis*). "Examples of a negative impact on access may  
20 include dropping grades, being diagnosed with behavioral and/or anxiety  
21 disorders, becoming homebound or hospitalized due to harassment, physical  
22 violence, or sexual assault." *Roe*, 678 F. Supp. 2d at 1028 (internal  
23 citations omitted). Here, J.B. endured consistent and substantial abuse  
24 throughout the spring of 2006. He suffered stomach problems,  
25 sleeplessness, anxiety, and depression so severe that he sought  
26 counseling. He was diagnosed with post-traumatic stress disorder,

1 anxiety disorder, and depression likely stemming from the abuse. He  
2 began thinking suicidal thoughts.

3 Accordingly, the Court concludes that the abuse J.B. endured on  
4 school grounds was so prolonged and humiliating to create an issue of  
5 fact as to whether the abuse had a concrete, negative effect on his  
6 education. *See Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F.  
7 Supp. 2d 952, 968 (D. Kan. 2005) (finding negative impact on victim's  
8 education or access when victim was diagnosed with anxiety or behavioral  
9 problems); *cf. Williams v. Bd. of Regents of the Univ. Sys. of Ga.*,  
10 (finding negative impact on victim's education under "extreme facts" of  
11 the case and when victim did not return to the university after the  
12 abuse).

## 13 **2. Mead's Actual Knowledge of the Abuse**

14 To maintain his Title IX cause of action, J.B. must establish that  
15 an appropriate school official actually knew that he was being sexually  
16 harassed or abused. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S.  
17 274, 283 (1998). "[I]t is generally accepted that the knowledge must  
18 encompass either actual notice of the precise instance of abuse that gave  
19 rise to the case at hand or actual knowledge of at least a significant  
20 risk of sexual abuse." *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d  
21 1325, 1347-48 (M.D. Ga. 2007). Thus, it is not enough to show that the  
22 school district "should have known" of the abuse. *Gebser*, 524 U.S. at  
23 283; *Reese*, 208 F.3d at 739; *Gabrielle M. v. Park Forest-Chicago Heights*,  
24 *Ill. Sch. Dist.* 163, 315 F.3d 817, 823 (7th Cir. 2003).

25 The Court finds that the Bells have failed to present sufficient  
26 evidence to create a genuine issue of material fact as to whether any

1 Mead official had actual notice. There is no evidence that any  
2 administrative official had notice of any sexual behavior or harassing  
3 conduct by M.L.U. or D.R.D. toward J.B. before June 1, 2006. At most,  
4 administrators knew that J.B. had kissed D.R.D., hugged the principal,  
5 and touched another student's backpack, which does not amount to sexual  
6 abuse or harassment. And once Mead learned of the abuse, it took  
7 immediate corrective action: it suspended D.R.D. and M.L.U., facilitated  
8 D.R.D.'s transfer to another high school, ensured that none of the  
9 students involved attended the same classes, and assigned a full-time  
10 supervisor for J.B. See *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir.  
11 1999) (affirming summary judgment dismissal of Title IX claim against  
12 school district because school district did not have actual notice of  
13 sexual assaults until "after the fact" and, upon notice, "quickly and  
14 effectively" corrected the situation).

15 Nor is there any evidence that M.L.U.'s and D.R.D.'s disciplinary  
16 history put Mead on notice of a significant risk that they might sexually  
17 abuse another student. That disciplinary history did not reveal that  
18 M.L.U. or D.R.D. had engaged, or would likely engage, in any sexualized  
19 behavior against another student during school hours. See *Ross*, 506 F.  
20 Supp. 2d at 1347-48 (finding school's knowledge of abuser's substance  
21 abuse history does not amount to actual knowledge that the abuser might  
22 sexually assault another student); cf. *Williams*, 477 F.3d at 1293  
23 (finding school's knowledge that student had been dismissed from two  
24 previous colleges after allegations that he had sexually assaulted two  
25 women and harassed another could constitute actual notice that he might  
26 sexually assault other students).

1 Thus, the only remaining question is whether the Bells' Title IX  
2 claim survives on an issue of fact as to whether Mr. Graham actually knew  
3 that J.B. was being sexually abused when he personally witnessed M.L.U.  
4 sitting atop J.B. in the field house during lunch in May 2006. The Court  
5 finds it does not.

6 As an initial matter, Mr. Graham, like all teachers at Mead, was an  
7 appropriate person for Title IX purposes because he had the authority to  
8 address the alleged discrimination and to institute corrective measures  
9 on J.B.'s behalf. See *Gebser*, 524 U.S. at 298 (defining "appropriate  
10 person"); *Murrell v. Sch. Dist. No. 1 of Denver*, 186 F.3d 1238, 1248  
11 (10th Cir. 1999) (recognizing that "teachers may well possess the  
12 requisite control necessary to take corrective action to end the  
13 discrimination").

14 Yet, the Court concludes that Mr. Graham did not have actual  
15 knowledge of J.B.'s abuse for Title IX purposes. The parties agree that  
16 when Mr. Graham entered the field house, J.B. was lying on the floor,  
17 M.L.U. was on top of him, and both students were fully clothed. The  
18 parties' perceptions of the events taking place, however, differ. J.B.  
19 claims that M.L.U. was laying on top of him, moving up and down, and  
20 "pretending to rape" him, while Mr. Graham recalls seeing M.L.U. "sitting  
21 astride," "hold[ing] [] down," or "wrestling" with J.B. but certainly  
22 nothing sexual or abusive. The fact that Mr. Graham's perception  
23 contradicts J.B.'s does not create an issue of fact: J.B. cannot testify  
24 as to what Mr. Graham perceived, and Mr. Graham has unequivocally  
25 testified that he did not perceive anything sexually suggestive.

1 But even assuming Mr. Graham perceived exactly what J.B. said  
2 occurred—that M.L.U. was “humping” or “pretending to rape” him—there is  
3 still no evidence that J.B. was being sexually abused or faced a  
4 significant risk of sexual abuse. What Mr. Graham witnessed was, at  
5 most, two students engaging in a consensual sexual act. In *Liu v.*  
6 *Striuli*, the district court of Rhode Island found that two college  
7 administrators’ knowledge of a sexual relationship between a professor  
8 and graduate student did not amount to actual knowledge that the student  
9 was being sexually abused because there was no evidence that the  
10 relationship was not mutually consensual. 36 F. Supp. 2d 452, 460 (D.R.I.  
11 1999). Indeed, the administrators maintained that “the couple held  
12 hands, kissed, and seemed to have affection for one another” in social  
13 settings. *Id.*

14 Here, as in *Liu*, there is no evidence that Mr. Graham knew the  
15 relationship was anything but consensual. *Id.* at 465-66. J.B. and  
16 M.L.U. were in a sexually suggestive position, but J.B. did not struggle  
17 or cry out to Mr. Graham for help. And because M.L.U. was slightly  
18 built,<sup>5</sup> her physical presence was not objectively coercive. It is not  
19 infrequent that teenagers exhibit sexualized behavior, sometimes while  
20 at school, but that does not imply abuse. There is simply no evidence  
21 that M.L.U.’s advances were uninvited. Without such evidence, the Court  
22 cannot conclude that Mr. Graham had actual knowledge of a significant  
23 risk that J.B. was being sexually abused.

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25  
26 <sup>5</sup> M.L.U. recalls weighing only ninety-five (95) pounds at the time  
of the incident. (ECF No. 67, Ex. E, at 60.)

1 A review of all the cases only substantiates the Court's conclusion.  
2 See *Doe v. Flaherty*, 2010 WL 4068748 (8th Cir. Oct. 19, 2010) (finding  
3 no actual knowledge despite district's knowledge of two inappropriate  
4 texts from teacher and report from parent that they spent time together  
5 and that "something was going on" between them); *Rost v. Steamboat*  
6 *Springs Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008) (finding learning-  
7 disabled student's statement to school counselor that boys were  
8 "bothering her" did not provide school district with actual knowledge,  
9 notwithstanding parent's pleas to counselor to find out what was  
10 bothering student); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001)  
11 (finding that elementary school principal did not have actual notice  
12 despite complaints of past abuse by teacher and other teacher's  
13 observation of physical contact between victim and teacher-abuser); *P.H.*  
14 *v. Sch. Dist. of Kan. City*, 265 F.3d 653, 659 (8th Cir. 2001) (finding  
15 combination of district's knowledge of teacher's abuse of student twenty  
16 years ago and excessive time spent with the instant student resulting in  
17 tardiness and falling grades insufficient to constitute actual  
18 knowledge); *Davis v. DeKalb Cnty. Sch. Dist.*, 233 F.3d 1367, 1372-73  
19 (11th Cir. 2000) (finding student's complaint that teacher "touched her  
20 behind" when she was hiking a football and later "tried to touch her at  
21 the water fountain" insufficient to alert district); cf. *Vance v.*  
22 *Spencer*, 231 F.2d 253, 257 (6th Cir. 2000) (upholding a jury verdict for  
23 female student where student was repeatedly propositioned, groped, and  
24 threatened by a fellow student several times in presence of teacher).

25 Taking J.B.'s assertion that M.L.U. was "pretending to rape" or  
26 "hump" him as true and without weighing evidence or assessing

1 credibility, the Court finds no issue of fact. While the Court is  
2 sympathetic to the challenges J.B. faces and the anguish his parents must  
3 feel knowing of the abuse their son endured, it cannot conclude that an  
4 appropriate school official actually knew that J.B. was either being, or  
5 at a significant risk of being, sexually harassed or  
6 abused. Accordingly, the Court **GRANTS** Mead's motion for summary judgment  
7 and dismisses the Bells' Title IX, 20 U.S.C. § 1681, claim.<sup>6</sup>

8 **C. 42 U.S.C. § 1983 Claim**

9 Mead argues that the Bells' 42 U.S.C. § 1983 claim must be dismissed  
10 because they cannot show that Mead deprived J.B. of a constitutional  
11 right, had policies or customs which evinced deliberate indifference to  
12 abuse, or that such customs or policies caused the abuse. The Bells do  
13 not oppose Mead's partial summary judgment motion on the § 1983 claim.

14 To state a claim under § 1983, a plaintiff must show a defendant,  
15 acting under state law, deprived a plaintiff of rights secured by the  
16 Constitution or federal statutes. *Gibson v. United States*, 781 F.2d  
17 1334, 1338 (9th Cir. 1986); see also *L.W. v. Grubbs*, 974 F.2d 119, 120  
18 (9th Cir. 1992). Government entities are "persons" under § 1983 and thus  
19 may be liable for causing a constitutional deprivation. *Monnell v. Dep't*  
20 *of Soc. Servs.*, 436 U.S. 658, 690 (1978). But such entity may not be  
21 sued under § 1983 solely because one of its employees or agents inflicted  
22 injury. *Id.* For government entity to be liable for its failure to act,  
23 a plaintiff must show:

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24  
25 <sup>6</sup> Having found that Mead did not have "actual knowledge" that J.B.  
26 was being sexually abused, the Court need not address the last element,  
whether Mead acted with deliberate indifference.

1 (1) that a [government] employee violated the plaintiff's  
2 constitutional rights; (2) that the [government entity] has  
3 customs or policies that amount to deliberate indifference; and  
the employee's violation of constitutional rights.

4 *Long v. Los Angeles*, 442 F.3d 1178, 1186 (9th Cir. 2006).

5 Mead argues, and the Bells do not dispute, that Mead was not  
6 directly responsible for depriving J.B. of his right to bodily security.  
7 Generally, a lack of due care by a state actor does not deprive an  
8 individual of due process rights. See *DeShaney v. Winnebago Cnty. Dep't*  
9 *of Soc. Servs.*, 489 U.S. 189, 196 (1989). Indeed, the Due Process Clause  
10 does not confer an affirmative right to government aid. *Id.* Nor does  
11 it require a state to "protect the life, liberty, and property of its  
12 citizens against invasion by private actors." *Id.*; see also *Shanks v.*  
13 *Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). There are two exceptions  
14 to the general rule that a state's failure to protect an individual from  
15 danger does not violate due process: first, when a "special relationship"  
16 exists between the state and the individual, and second, when a state  
17 affirmatively places the individual in a dangerous situation. *Estate of*  
18 *Amos ex rel. Amos v. City of Page, Ariz.*, 257 F.3d 1086, 1090 (9th Cir.  
19 2001) (citing *Huffman v. Cnty. of Los Angeles*, 147 F.3d 1054, 1058 (9th  
20 Cir. 1998)).

21 Neither of these two exceptions apply here. No special relationship  
22 exists between Mead and J.B. because J.B. was not in custody or held  
23 against his will when the abuse occurred. *DeShaney*, 489 U.S. at 199-200;  
24 *Amos*, 257 F.3d at 1090 (recognizing no affirmative duty exists to ensure  
25 "safety and general well-being" if plaintiff is not in custody or held  
26 against his will); *Monohan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d

1 987, 991 (1st Cir. 1992) ("[H]ere, where no such involuntary commitment  
2 has occurred, [Plaintiff's] 'special relationship' argument is without  
3 force."). Nor is there any evidence that Mead subjected or affirmatively  
4 placed J.B. in a dangerous situation. See *Munger v. City of Glasgow*, 227  
5 F.3d 894, 900 (9th Cir. 2000) (recognizing that state actors may be held  
6 liable "where they affirmatively place an individual in danger").  
7 Accordingly, the Court finds that Mead did not deprive J.B. of a  
8 constitutional right.

9 Because the Bells cannot establish that Mead violated J.B.'s  
10 constitutional right, no further analysis is necessary. But even  
11 assuming they could, the Bells still must establish that Mead has customs  
12 or policies that amount to deliberate indifference to that right,  
13 *Monnell*, 436 U.S. at 690-91, and "that the injury would have been  
14 avoided" had proper policies been implemented, *Gibson v. Cnty. of*  
15 *Washoe, Nev.*, 290 F.3d 1174, 1196 (9th Cir. 2002). "Deliberate  
16 indifference requires both knowledge that a harm to a federally protected  
17 right is substantially likely, and a failure to act upon that  
18 likelihood." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir.  
19 2001). Here, the Bells fail to identify, and therefore fail to prove,  
20 that any custom or policy of inaction amounts to "deliberate  
21 indifference" to J.B.'s constitutional rights or that the policy or  
22 custom could have prevented the conduct in question. Accordingly, the  
23 Court **GRANTS** Mead's motion for summary judgment and dismisses the Bells'  
24 42 U.S.C. § 1983 claim.

25 **II. Defendant's Motion to Exclude Judith Billings (ECF No. 46)**  
26

1 Mead moves to exclude the testimony of Judith Billings, the Bells'  
2 expert on school policies and procedures regarding supervision of special  
3 education students. Mead argues that 1) Ms. Billings' opinions are not  
4 the proper basis of expert testimony, and 2) she lacks the requisite  
5 qualifications to opine on Mead's supervision of its special education  
6 students. The Bells oppose Mead's motion.

7 Federal Rule of Evidence 702 imposes an obligation on the trial  
8 judge to screen expert testimony:

9 If scientific, technical, or other specialized  
10 knowledge will assist the trier of fact to  
11 understand the evidence or to determine a fact in  
12 issue, a witness qualified as an expert by  
13 knowledge, skill, experience, training, or  
14 education, may testify thereto in the form of an  
opinion or otherwise, if (1) the testimony is based  
upon sufficient facts or data, (2) the testimony is  
the product of reliable principles and methods, and  
(3) the witness has applied the principles and  
methods reliably to the facts of the case.

15 Fed. R. Evid. 702 (2010). Once a proffered expert's testimony is  
16 challenged, the district court has a "gatekeeping responsibility" to  
17 ensure the testimony has "a reliable basis in the knowledge and  
18 experience of [the relevant] discipline." *Kumho Tire Co. Ltd. v.*  
19 *Carmichael*, 526 U.S. 137, 149 (1999); see also *Daubert v. Merrell Dow*  
20 *Pharm.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136  
21 (1997). The Court's gatekeeper role applies not only to scientific  
22 testimony, but all testimony. *Kumho Tire Co. Ltd.*, 526 U.S. at 148. The  
23 proponent of the expert has the burden of proving, by a preponderance of  
24 evidence, that the expert's testimony is admissible. *Lust v. Merrell Dow*  
25 *Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert*, 509 U.S. at 592

1 n.10. Because Mead challenged Ms. Billings' proffered expert testimony,  
2 the Court engages in its gatekeeping responsibility.

3 **A. Fact in Issue**

4 Through expert testimony, the Bells intend to prove that Mead's  
5 supervision of J.B. did not meet the applicable standard of care. Ms.  
6 Billings was retained by the Bells to conclude that, based on her expert  
7 opinion and specialized knowledge of Washington schools' policies,  
8 practices, and procedures, Mead's conduct violated laws and protocols  
9 requiring it to monitor or supervise the special education students  
10 involved in the abuse.

11 Mead argues that Ms. Billings' opinion is improper because it simply  
12 recites the law and applies to this case. "It is well-established . .  
13 . that expert testimony concerning an ultimate issue is not per se  
14 improper." *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066  
15 n.10 (9th Cir. 2002). Indeed, Federal Rule of Evidence 704(a) provides  
16 that expert testimony that is "otherwise admissible is not objectionable  
17 because it embraces an ultimate issue to be decided by the trier of  
18 fact." But an expert witness cannot opine as to her legal conclusion:  
19 an opinion on an ultimate issue of law. *See Hangarter v. Provident Life*  
20 *& Acc. Ins. Co.*, 373 F.3d 998, 1016-17 (9th Cir. 2004); *see also United*  
21 *States v. Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987); *United States v.*  
22 *W.R. Grace*, 455 F. Supp. 2d 1156, 1166 (D. Mont. 2006).

23 Ms. Billings will testify that as a result of being allowed to go  
24 into these secluded, closed rooms without supervision, the special  
25 education students were able to abuse and harass J.B. throughout the  
26 spring of 2006. To support this proposition, she points to laws that

1 govern teachers and administrators in supervising special education  
2 students.<sup>7</sup>

3 Here, because teachers and administrators' decisions regarding  
4 supervision are largely informed by the laws and policies Ms. Billings  
5 cites, her testimony is accurate and helpful to the jury. See Fed. R.  
6 Evid. 702 (recognizing that expert opinion must "assist the trier of fact  
7 to understanding the evidence or to determine a fact in issue"). And by  
8 referring to the law governing teachers and administrators, Ms. Billings  
9 does not instruct the jury on the law at issue or state a legal  
10 conclusion; rather, she uses these statutes to define the applicable  
11 standard of care in a negligence action. The Court concludes that even  
12 though it is not relevant to the summary judgment motion, Ms. Billings'  
13 testimony, including references to the general law, will assist the trier  
14 of fact in 1) understanding the applicable standard of care and 2)  
15 ultimately determining whether Mead breached that standard.

16 **B. Qualifications**

17 Mead argues that Ms. Billings is not qualified to testify regarding  
18 the policies and procedures for supervision of special education students  
19 because she has: 1) not worked in a school district since 1978, twenty-

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21 <sup>7</sup> For example, when asked to define the applicable standard of care  
22 that she believes Mead breached, she pointed to the doctrine of *in loco*  
23 *parentis*: how a reasonably responsible parent would supervise his or her  
24 child. She also references WAC 392-172A-1175, which sets forth the goals  
25 and purposes of special education, and RCW 28A.300.285, Washington's  
26 Anti-Bullying Statute, to support her opinion.

1 eight years before the conduct giving rise to this litigation; 2) no  
2 experience acting as an administrator in a large high school; and 3) not  
3 worked with special education students in thirteen years.

4 To determine whether a witness is qualified to offer expert  
5 opinions, the district court assesses the witnesses' experience,  
6 training, education, knowledge, and skill. Fed. R. Evid. 702; *United*  
7 *States v. Vallejo*, 237 F.3d 1008, 1018 (9th Cir. 2001). Although  
8 experience is often the only basis for reliable expert testimony, Fed.  
9 R. Evid. 702 adv. committee note (2000), an expert who relies on  
10 experience must "explain how that experience leads to the conclusion  
11 reached, why the experience is a sufficient basis for the opinion, and  
12 how that experience is reliably applied to the facts." *Id.*

13 Ms. Billings has over forty-seven years of experience in primary and  
14 secondary education. A former teacher and administrator, Ms. Billings  
15 has worked on education policy, including holding the position of  
16 Superintendent of Public Instruction for the State of Washington for two  
17 full terms from 1989 to 1997. While serving in this capacity, Ms.  
18 Billings regularly consulted educators throughout the state, testified  
19 before the Washington State Legislature, and served on education-related  
20 boards and committees regarding safety, supervision, and monitoring of  
21 special education students. She also oversaw and implemented special  
22 education programs. Since then, she has been retained by twenty-four  
23 different law firms to testify as to appropriate supervision, hiring, and  
24 district practices regarding student safety, ten of which involved  
25 special education students, and seven of which involved student-on-  
26 student harassment. The Court concludes that Ms. Billings' significant

1 experience qualifies her to render opinions on standard of care issues  
2 involving special education students.

3 **C. Basis and Fit**

4 Mead argues that Ms. Billings' opinions about the applicable  
5 standard of care is not appropriate expert testimony because it is  
6 neither scientific or technical, nor involve other specialized knowledge.  
7 Mead also argues that in arriving at her opinions, Ms. Billings did not  
8 perform any kind of research or survey as to how school districts in  
9 Washington supervise special education students.

10 Federal Rule of Evidence 702 requires (1) an expert's testimony to  
11 be based upon sufficient facts or data, (2) the testimony to be the  
12 product of reliable principles and methods, and (3) the expert must apply  
13 the principles and methods reliably to the facts of the case. Fed. R.  
14 Evid. 702. *Daubert* set forth several factors for the court to consider  
15 while considering the principles and methodology, 509 U.S. at 593-95;  
16 these factors are flexible, and include whether the theory is testable,  
17 has been subject to peer review and publication, or generally accepted.  
18 *Id.* These factors are, however, merely illustrative and not applicable  
19 in cases where the proffered expert testimony is based on personal  
20 experience rather than scientific studies. *Daubert*, 43 F.3d at 1316-17  
21 (9th Cir. 1995). Accordingly, the central focus of *Daubert*'s reliability  
22 gatekeeping requirement "is to make certain that an expert, whether  
23 basing testimony upon professional studies or personal experience,  
24 employs in the courtroom the same level of intellectual rigor that  
25 characterizes the practice of an expert in the relevant field." *Kumho*  
26 *Tire Co. Ltd.*, 526 U.S. at 152.

1 Here, Ms. Billings bases her testimony on a life-long study of  
2 education policy and personal experience as a teacher and policymaker.  
3 She has demonstrated that she can and will employ a high level of  
4 intellectual rigor when rendering opinions about the applicable standard  
5 of care and whether Mead breached it. Mead has failed to point to any  
6 part of her testimony that is unsupported by sufficient facts, is  
7 unreliable, or incorrectly applies the facts to her experience. The  
8 Court is satisfied that Ms. Billings' testimony is the proper basis for  
9 an expert opinion and that she has reliably applied these conclusions to  
10 the facts of this case. Accordingly, Mead's motion to exclude Ms.  
11 Billings' testimony is **DENIED**. Ms. Billings may testify at trial  
12 regarding school district standards and the reasonableness of Mead's  
13 actions; she may not, however, opine as to whether Mead is ultimately  
14 liable for breaching that standard of care.

### 15 **III. Supplemental Jurisdiction**

16 This Court has jurisdiction over the remaining state law claims  
17 under 28 U.S.C. § 1367(a), because they arise from the same facts as the  
18 Bells' federal Title IX and 42 U.S.C. § 1983 claims. This Court may  
19 decline to exercise its supplemental jurisdiction if "the district court  
20 has dismissed all claims over which it had original jurisdiction." 28  
21 U.S.C. § 1367 (c)(3). Yet, the Court may retain jurisdiction after the  
22 basis for original jurisdiction is removed. *Watkins v. Grover*, 508 F.2d  
23 920, 921 (9th Cir. 1974). To determine whether to retain or decline  
24 jurisdiction, a district court may appropriately consider "the values of  
25 economy, convenience, fairness, and comity." *Harrell v. 20th Century*

1 *Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) (quoting *Carnegie-Mellon*  
2 *Univ. v. Cohill*, 484 U.S. 343, 351 (1988)).

3 This case has been pending in this Court for over two years. During  
4 this time, the Court has ruled on discovery and case scheduling issues,  
5 becoming familiar with the factual and legal details of the dispute.  
6 Economy and fairness therefore favor retention. Because the parties do  
7 not jointly request remand, the Court retains supplemental jurisdiction  
8 over the Bells' state law claims pursuant to 28 U.S.C. § 1367(a).

9 Accordingly, **IT IS ORDERED:**

10 1. Mead's Motion for Summary Judgment (**ECF No. 40**) is **GRANTED**.

11 2. Mead's Motion to Exclude Judith Billings (**ECF No. 46**) is **DENIED**.

12 3. The Court retains supplemental jurisdiction over the remaining  
13 state law claims.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
15 this Order and forward copies to counsel.

16 **DATED** this 10<sup>th</sup> day of December 2010.

17 \_\_\_\_\_  
18 S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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